

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

<i>In re</i>	:	
	:	Chapter 11
	:	
ZOSANO PHARMA CORPORATION,	:	Case No. 22-10506 (JKS)
	:	
	:	Re: D.I. 41
	:	
Debtor.	:	Obj. Deadline June 23, 2022 at 4:00 P.M. ET (Extended to June 28, 2022 at 10:00 AM for UST)
	:	Hearing Date: June 30, 2022 at 1:00 PM
	:	

OBJECTION OF THE UNITED STATES TRUSTEE TO THE APPLICATION OF THE DEBTOR FOR ENTRY OF AN ORDER APPROVING THE RETENTION AND EMPLOYMENT OF ONYX ASSET ADVISORS, LLC AND RABIN WORLDWIDE, INC. AS SALE AGENT

In support of his objection to the *Application of the Debtor for Entry of an Order Approving the Retention and Employment of Onyx Asset Advisors, LLC and Rabin Worldwide, Inc.* (together, “Onyx/Rabin” or the “Sale Agent”) as *Sale Agent* (the “Application”) [D.I. 41], Andrew R. Vara, United States Trustee for Region Three (“U.S. Trustee”), through his counsel, avers:

INTRODUCTION

1. This Court has jurisdiction over the above-captioned case pursuant to 28 U.S.C. § 1334. This Court is authorized to hear and determine the Application pursuant to 28 U.S.C. § 157(a, b), and the amended standing order of reference issued by the United States District Court for the District of Delaware dated February 29, 2012. Venue of the case is proper in this District pursuant to 28 U.S.C. § 1408(1).

2. Under 28 U.S.C. § 586, the U.S. Trustee is generally charged with monitoring the federal bankruptcy system. See *United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that U.S. Trustee has “public interest standing” under 11 U.S.C. § 307 which goes beyond mere pecuniary interest); *Morgenstern v. Revco*



D.S., Inc. (In re Revco D.S., Inc.), 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a “watchdog”). Specifically, the U.S. Trustee is charged with “monitoring the progress of cases under title 11 and taking such actions as the United States trustee deems to be appropriate to prevent undue delay in such progress.” 28 U.S.C. § 586(a)(3)(G).

3. The U.S. Trustee has standing to be heard with respect to the Application pursuant to 11 U.S.C. § 307.

GROUND/BASIS FOR OBJECTION

4. The U.S. Trustee objects to the Application on three grounds: (i) first, it is duplicative of efforts proposed to be undertaken by SierraConstellation Partners, LLC (“SCP”), the Debtor’s proposed financial advisor [D.I. 40]; (ii) second, the need for the requested relief is speculative, as the Debtor does not presently know whether property will remain after SCP’s marketing efforts and whether the value of any remaining items would justify the proposed expense of employing Onyx/Rabin; and (iii) the Debtor proposes to short-circuit the Debtor’s own proposed interim compensation procedures for professionals [D.I. 37] by permitting Onyx/Rabin to pay itself before delivering the sale proceeds to the Debtor.

5. Initially, via the Application, the Debtor proposes to retain and employ Onyx/Rabin as sale agent to “market, auction, and sell the estate property in the Case . . .” by the following methods: (i) campaigning to the Onyx/Rabin’s customer database, which allows Onyx/Rabin to directly solicit its closest contacts in the biopharmaceutical industry and other associated industries; (ii) reaching out to its network of buyers from previous sales who are actively seeking items to purchase at auction; (iii) advertising in local and national industry publications; and (iv) directly contacting and fully campaigning to collectors, investors, dealers, and related buyers, including those saved in Onyx/Rabin’s proprietary customer database. Appl. ¶ 6. Onyx/Rabin’s

proposed employment would duplicate that of SCP, which has been employed by the Debtor since March 2022. SCP Appl. ¶ 8 (“[a]ssist[ing] with sale of assets and liquidation of the Debtor” part of SCP’s proposed scope of services).

6. Second, the Debtor’s need to employ Onyx/Rabin is speculative, and the speculative nature of the proposed employment precludes a meaningful evaluation of whether the benefit of having Onyx/Rabin market the Debtor’s assets a second time (that is, after SCP has conducted the initial marketing effort) justifies the expense of engaging the firm. In addition to seeking to employ SCP at its standard hourly rates (which range from \$275 to \$1,005, with a median rate north of \$500/hour), the Debtor proposes to pay Onyx/Rabin (i) a “Commitment Fee” of \$50,000; (ii) a “Buyer’s Premium” of 18% less the Commitment Fee;¹ and (iii) “Sale Expenses” in an amount up to \$37,500. Appl. ¶¶ 13 – 15. Without knowing what the Debtor is capable of selling with SCP’s assistance alone, this Court cannot determine whether engaging Onyx/Rabin is cost-effective.

7. Third, if this Court permits the employment of Onyx/Rabin, the firm should be paid only after the firm complies with the Debtor’s proposed interim compensation procedures. The Debtor proposes to pay Onyx/Rabin “upon the submission of an auctioneer’s report . . . in accordance with Bankruptcy Rule 6004(f)(1),” without further order of the Court. Appl. ¶ 17; Ex. B (Agreement) ¶ 10. Onyx/Rabin is an “auctioneer” required to be retained under section 327(a) of the Bankruptcy Code. *See* 11 U.S.C. § 327(a). The compensation and reimbursement sought by auctioneers has to be applied for, on notice, and allowed by this Court before the firm can be

¹ While the Debtor attempts to defend the Buyer’s Premium on grounds that it is tacked on to the winning bid at auction -- thereby implying that it does not cost the Debtor anything -- the educated buyer to which Onyx/Rabin proposes to market the assets simply factors that amount into what it is willing to pay to acquire the asset. Thus, the Debtor ultimately bears the cost of the Buyer’s Premium, as it depresses the sale price.

paid by the Debtor. See 11 U.S.C. §§ 330, 331. Accordingly, this Court should decline the Debtor's invitation to exempt Onyx/Rabin from the Code's fee application requirement.

CONCLUSION

WHEREFORE the U.S. Trustee requests that this Court enter an order denying the Application or granting relief consistent with this objection.

Dated: June 28, 2022
Wilmington, Delaware

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE,
REGIONS 3 and 9

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